Supreme Court, U.S.
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No. 93-707

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

RALPH CONDO,

Petitioner,

v.

SYSCO CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENT SYSCO CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION RESTATED

Whether the Court of Appeals correctly held that 29 C.F.R. § 778.114 (1992) applies in this case to Petitioner's employment contract, and, if so, whether that regulation complies with Section 7(a)(1) of the Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C. § 207(a)(1) (1988).

STATEMENT REQUIRED BY RULE 29.1

Sysco Corporation has no parent company and no subsidiaries except wholly owned subsidiaries.

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In this case the Court of Appeals held that the system used by Respondent to compensate Petitioner for his overtime hours under a written agreement between Petitioner and Respondent complied with § 7(a)(1) of the FLSA, 29 U.S.C. § 207(a)(1) (1988). That holding does not conflict with the holding of any other court, and is simply a routine application of settled principles to the particular facts of this case.

COUNTERSTATEMENT OF THE CASE

Summary of Facts

Although Petitioner has set forth his view of the case, the United States Court of Appeals for the Seventh Circuit objectively found the facts to be as follows:

> On March 23, 1984, Condo entered into a written employment contract with Sysco Corporation. Under the terms of the contract, Condo's duties were serving as chauffeur for Sysco's chairman of the board and working in the company's mail room. The job entailed significant overtime. In exchange for his services, Condo received a fixed salary of $400 per week for all hours worked plus overtime pay for all hours worked in excess of forty. The amount of overtime pay was calculated by dividing Condo's fixed weekly salary of $400 by the total number of hours that he worked each week to yield an hourly rate of pay for the workweek. All hours that Condo worked in excess of forty were compensated at fifty percent of this hourly rate. For purposes of clarification, the employment contract included illustrations of how Condo's overtime pay was to be calculated.[1]
>
> Condo was paid for his services in accordance with the terms of this contract from March 23, 1984, until October 2, 1986.[2] In March of 1991 Condo brought an action against Sysco, alleging that the system it had used to calculate his compensation violated § 7(a)(1) of the FLSA, 29 U.S.C. § 207(a)(1) (1988), and the parallel section of the Illinois Minimum Wage Law, 820 ILCS 105/4a(1) (1993). Section 7(a)(1) of the FLSA provides that an employee shall not be employed for more than forty hours in a given week unless the employee receives compensation for all hours in excess of forty "at a rate not less than one and one-half times the regular rate at which he is employed." The language of the Illinois law is substantially the same. Condo argued that the system of payment for

overtime in the contract violated the federal and state laws because under the system he was paid for his overtime hours not at a rate of one and one-half times the hourly rate of pay as is mandated by these laws, but rather at a rate of only one-half his hourly rate of pay. Each party moved for summary judgment, and the district court entered judgment in Sysco's favor. The court found that the system of payment was consistent with § 7(a)(1) of the FLSA and its counterpart under Illinois law, and furthermore, that the system was explicitly authorized by 29 C.F.R. § 778.114 (1992), a regulation promulgated by the Department of Labor to help explain § 7(a), and by Illinois Administrative Code tit. 56, § 200.420(f) (1991), the corresponding state regulation. This appeal followed.

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[1] For example, the chart illustrated how Condo's total salary for weeks during which he worked for fifty hours would be $440: For fifty-hour workweeks (as for all workweeks) Condo's base pay would be $400. Overtime pay would be one-half of the hourly rate (i.e., ½ of fifty hours divided into $400, or $4.00), multiplied by the ten hours of overtime worked, which results in a sum of $40.00. This overtime pay added to the base pay results in the total weekly salary of $440. For sixty-hour weeks, the chart explained that Condo's total salary would be $400 + (½ ($400/60 hours)) x 18 hours, or $466.60. The chart also provided examples for workweeks of fifty-eight hours, fifty-five hours, forty hours, and fifty-three hours.

[2] On October 2, 1986, Sysco fixed Condo's hourly rate for regular time at $9.00 and his hourly rate for overtime at one and one-half of this figure, or $13.50.

Condo v. Sysco Corp., 1 F.3d 599, 600-01 (7th Cir. 1993), Appendix to Petition, A-2 through A-3.

Clarification or Distinction of Other Facts and Statements

(1) Petitioner's statement (Petition, p. 3) that the parties "agree that he received overtime for these overtime hours at a rate of less than 'one-half time' " is incorrect and unsupported by anything in the record. Although Petitioner does not explain what he means by "one-half time," Respondent has never agreed that Petitioner was paid for hours in excess of forty in any workweek at any rate other than the statutorily required one and one-half times the regular rate at which he was employed during that workweek.

(2) Petitioner's characterization (Petition, p. 3) of Respondent's successful contention in the courts below as being "despite the wording of the Fair Labor Standards Act," and "despite the failure of the contract to qualify for the sole statutory exception cited hereinabove," is legally incorrect because Respondent's successful contention in those courts was and is supported by § 7(a)(1) of the FLSA, 29 U.S.C. § 207(a)(1) (1988).

(3) Petitioner's statement (Petition, p. 4) that his contract set his overtime hourly pay "at less than one-half the hourly rate at which his first 40 hours' work of each week was calculated" is legally incorrect and unsupported by anything in the record, because under § 7(a)(1) of the Act the "hourly rate at which his first 40 hours' work of each week was calculated" is a meaningless concept.

(4) Petitioner's statement (Petition, p. 4) that the Court of Appeals below "acknowledged that the sole *statutory* exception to the time-and-one-half requirement of § 7(a) of the . . . Act is § 7(f)" is factually and legally incorrect. The Court of Appeals acknowledged only that § 7(f) of the Act provides "an exception" to § 7(a)'s requirement of

payment of time and one-half an employee's regular rate for hours worked in excess of forty in a week. 1 F.3d 599, 602, Appendix to Petition, A-5. The Act provides other exceptions to the overtime requirements of § 7(a)(1). *See* 29 U.S.C. § 207(b), (g), (i), (j), (k), (m), (n), (o) and (q).

(5) Petitioner's statement (Petition, p. 5) that for an employee employed pursuant to an agreement authorized by § 7(f) of the Act "his hours in excess of forty are considered to have been paid by the fixed weekly sum" is unsupported by anything in the record and is legally incorrect because, under § 7(f), such an agreement may provide a weekly guaranty of pay only for not more than sixty hours based on the specified rates. 29 U.S.C. § 207(f)(2) (1988).

(6) Petitioner's statement (Petition, p. 5) that Sysco "relied upon 29 C.F.R. § 778.114 as providing different and independent exception to the 'time-and-one-half' mandate of § 7(a)" is not supported by anything in the record and is incorrect. Respondent never has asserted, and does not now assert, that 29 C.F.R. § 778.114 provides an exception to the time and one-half requirement of § 7(a) of the Act. That regulation simply sets forth the permissible, proper method of calculating an employee's § 7(a) regular rate and overtime pay under the factual circumstances set forth in the regulation and which existed under the employment contract between Petitioner and Respondent in this case.

(7) Petitioner's statement (Petition, p. 6) that the Court of Appeals' decision in this case, and that of the Court of Appeals for the Fifth Circuit in *Yadav v. Coleman Oldsmobile, Inc.*, 538 F.2d 1206 (1976), are contrary to the decision in *Marshall v. Hamburg*, 577 F.2d 444 (8th Cir. 1978), is legally incorrect, as explained in this brief, *infra*, at pages 6-7.

REASONS FOR DENYING THE WRIT

Neither of the reasons asserted by Petitioner as a basis for granting a writ of certiorari is a valid reason for doing so. The decision of the Court of Appeals below does not conflict with the terms of the FLSA, and is not inconsistent with the decision in *Marshall v. Hamburg*, 577 F.2d 444 (8th Cir. 1978). Nor does the decision below eliminate any protection afforded employees by the FLSA overtime provisions.

I. There Is No Conflict Between Circuits.

In asserting a conflict between the Circuit Court of Appeals decision below and that of the Eighth Circuit Court of Appeals in *Marshall v. Hamburg Shirt Corp.*, 577 F.2d 444 (1978), Petitioner simply misreads the *Hamburg* decision. There is no conflict between the two decisions.

In *Hamburg*, the Court of Appeals held that the contractual agreement pay plans there in issue were not valid under FLSA § 7(f) because the duties of the employees did not necessitate irregular hours of work, as required by FLSA § 7(f), and because those plans did not compensate weekly hours in excess of 40 at one and one-half times a specified regular rate. *Id.* at 447. The *Hamburg* plans guaranteed specified numbers of hours of pay per week, ranging from 45 to 50, whether the employees worked those hours or not. The Eighth Circuit correctly held that the employees' guaranteed weekly pay amounts, rather than the contractually specified weekly salaries, which never were actually paid because of the guaranties, should be considered the fixed weekly wages. *Id.*

The remedy in *Hamburg*, under § 7(a) of the FLSA, was to determine the employees' regular rates by dividing their guaranteed weekly pay amounts, rather than their contractually specified weekly salaries, by the number of

hours actually worked in each week, and then to pay the employees additional compensation for all hours worked in excess of 40 each week at one-half the regular rates thus determined, in addition to their guaranteed weekly pay amounts. The remedy ordered in *Hamburg* is precisely the method required by 29 C.F.R. § 778.114 and used in determining Petitioner's overtime compensation in this case.

The difference between *Hamburg* and this case is that in the former "the practical effect of the guaranty is to allow the employer to pay the same compensation each week even though the employee works a varying number of hours," 577 F.2d at 446, while in this case Petitioner was paid different amounts of weekly compensation depending on the number of overtime hours he worked each week.

Thus, there is no conflict between the Courts of Appeals decisions here and in *Hamburg*. FLSA § 7(f) and 29 C.F.R. § 778.403 did not apply in either case. FLSA § 7(a)(1) and 29 C.F.R. § 778.114 applied in both cases.

II. The Decision Below Does Not Eliminate Any Protection Afforded Employees By The Fair Labor Standards Act.

Petitioner is dead wrong in asserting that the Court of Appeals decision allows employers to pay employees less overtime pay than is required by FLSA § 7(a). Petitioner was properly paid overtime pay under that section as specified by 29 C.F.R. § 778.114. This Court long ago approved the method, now embodied in 29 C.F.R. § 778.114, of determining an employee's regular rate under FLSA § 7(a) for working fluctuating hours each week. *Overnight Motor Transp. Co., Inc. v. Missel*, 316 U.S. 572, 579-80 (1942).

The reason neither the District Court nor the Court of Appeals in this case discussed 29 C.F.R. § 778.403 is because that regulation applies only to pay arrangements where an employer pays the "*same total compensation each week* to an employee who works overtime and whose hours of work vary from week to week." 29 C.F.R. § 778.403 (1993) (emphasis supplied). Petitioner was not paid the same total compensation each week. His total weekly compensation varied depending on how many hours over 40, if any, he worked each week. Thus, 29 C.F.R. § 778.403 is inapplicable here.

CONCLUSION

Because there is no conflict between the Court of Appeals decision in this case and the decision of the Eighth Circuit in *Marshall v. Hamburg Shirt Corp.*, 577 F.2d 444 (1978), and because there are no other "special and important reasons" for granting a writ of certiorari in this case, S. Ct. R. 10.1, the Petition for such a writ should be denied.

Respectfully submitted,

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